

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

MISC. LAND APPLICATION NO.108 OF 2015

(C/F High Court of Tanzania at Arusha Land Case No.35 of 2010)

JOSEPH KIMPINGA APPLICANT

VERSUS

ABBAS FADHILI RESPONDENT

RULING

MAGHIMBI, J

The applicant herein preferred this application under the provisions of Section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2002, applying for an extension of time within which he can apply for leave to appeal to the court of appeal of Tanzania against judgment and decree of this Court in Land Case No. 35/2010. The applicant further prayed that the costs for the application be in the cause. The application was supported by an affidavit of the applicant dated 06/07/2015.

Along with their counter affidavit, the respondents filed a notice of contention by way of a preliminary objection that this No. 108/2015 is incompetent and this court is *functus officio* to hear and determine this application. Upon prayer by the applicant and having no objection from the respondent, the court ordered that the application be disposed by way of

written submission. Both parties adhered to the schedule of submission and hence this ruling.

The applicant was represented by Mr. Lawena learned Counsel and Mr. Sambo, learned Counsel, represented the respondent. In his submission supporting his preliminary objection, Mr. Sambo availed the court with the historical background of this application. That on the 25/03/2015 this Honorable Court delivered its judgment in Land Case Number 35 of 2010 in which it decided in favour of the Respondent herein. Dissatisfied with the said judgment and decree, the applicant through the service of S.J. Lawena filed a Misc. Application Number 91 of 2015 applying for leave to appeal to Court of Appeal. The said application was dismissed by this court through Mwaimu, J., for being time barred. After dismissal of the Misc. Application Number 91 of 2015, the applicant filed another application for extension of time to apply for leave appeal to court of appeal under Section 11 (1) of the appellate Jurisdiction Act, 1979 Cap 141 RE 2002. Mr. Sambo hence submitted that it is from these facts that the Respondent herein raised this preliminary objection that Misc. Application Number 108 of 2015 is incompetent and the court is functus officio to hear and determine the application.

To support his objection, Mr. Sambo cited the meaning of the word Dismiss as used in common law, in the Black's Law Dictionary 6th Edition, by Joseph r. Nolan and Jacqueline M. Nolan-Haley at page 469, The learned author's defines the word "Dismissal" as: -

*"An **order** or judgment **finally disposing of an action, suit, motion** etc without trial of the issues involved. Such may be either voluntary or involuntary".*

He then cited the Court of Appeal case of ***Ngoni-Matengo Co-operative Marketing Union Ltd Vs Alimahomed Osman*** [1959] E.A. at page 580 where the court firstly differentiated the word **"dismissal"** and **"strike out"** when it quoted with approval the case of ***Mustafa Fidahusein Esmail Vs Dr. Posanyi Jumah Madati Civil Appeal No. 43 of 2003 (unreported)*** where the court had this to say at page 5.

"This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought to strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it for the latter phrase implies that a competent appeal has been disposed of while the former phrase implies that there was no proper appeal capable of being disposed of".

Mr. Sambo further cited the Ruling of the Court of Appeal also in the case of ***Olam Uganda Ltd and others Vs Tanzania Harbors Authority, Civil Appeal No. 57 of 2002 at page 10, (unreported)*** where it was held that:

"In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot re-file

another suit against the respondent based on the same cause of action unless and until dismissal order has been vacated either on".

He further cited the Court of Appeal recent case of **VIP Engineering and Marketing Ltd Vs SGS Societe Generale DE Surveillance and another, [2011] E.A** page 445 where the Court of Appeal of Tanzania had this to say, at page 446.

"The effect of striking out a matter and dismissing it are different. Where a matter is struck out a party may come back to court with the same matter after complying with whatever legal requirement that he has not complied with at the beginning. On other hand, you cannot come back to court with the same matter that has been dismissed".

Mr. Sambo then argued that without a flicker of doubt, from the authorities cited above when the Application is dismissed, it implies that the same has been finally determined. He argued further that, the order for dismissal will result into decree which shows clearly that the matter has already been determined between the parties hence a party cannot re-file another suit/ application on the same cause of action.

Mr. Sambo submitted that the applicant herein is trying to seek for extension of time to file an application for leave, an application which was dismissed. That this application is incompetent as it tries and or aim to bring and or take the court to decide to the application which has been already determined to its finality. Further that this Honorable Court will be

functus officio and without jurisdiction to hear the application which was previously dismissed by this same court.

He argued that the remedy which the applicant had after the dismissal of his application for leave, was given in the case of ***Said Salim Bkheresa Vs Ally Ngune***, [1997] T.L.R 312 where the Court of Appeal had this to say:

"Notwithstanding the impropriety of the order dismissing the appeal in terms of provisions of the civil procedure code, as long as the order still remained unvacated, the remedy open to the appellant was either to appeal to the court or seek review of the matter by the High Court".

He submitted that, so long as the application for leave by the applicant was dismissed by this court on the 22/06/2015 the applicant cannot come back. That the applicant seeks for extension of time to file application for leave which was previous dismissed by this honorable court and as per VIP Engineering case cited above he cannot come back if the application is dismissed.

He concluded that this court is functus official to hear this application and prayed that this Honorable Court sustain the preliminary objection raised and dismiss this application with costs.

In his reply, Mr. Lawena submitted that the present application has been brought under the provisions of Section 11(1) of Cap. 141 RE 2002 which grant jurisdiction to the High Court to extend time for one to file an

application for leave to appeal. He argued that the previous application was dismissed for being time barred. This did not remove this Court's competence to deal with this current application and they are not refiling the same application that was dismissed.

Mr. Lawena further argued that in order to appeal to the court of appeal even for the dismissal order, one has to seek leave as the appeal is not automatic. That the law is clear that the applicant has the right to file this application to this Court for extension of time within which to file for leave. He concluded that this objection has no merits and prayed that the same be dismissed and the application be placed for hearing inter parties.

In his rejoinder, Mr. Sambo submitted that the law cited by the counsel for the applicant is irrelevant and inapplicable to the circumstances at hand because the application which they try to seek for extension of time has far been dismissed. The authority of the case of Said Salim Bkheresa Vs Ally Ngune, [1997] T.L.R 312 clearly provides the remedy in case the matter has been dismissed. He submitted that this court being the court which granted dismissal order is now functus officio to proceed and hear the application before it, unless the application before it was for review. He argued that since the application for leave was dismissed for being time barred, it removes the competency of this court to try that matter again. Further that Mr. Lawena has failed to distinguish between the words dismissal and struck out as used in law in our jurisdiction and common law in general. Mr. Sambo emphasized that the preliminary point of law be upheld and the application be struck out with costs.

I have considered the arguments raised in the submission of the parties and I think what we first need to establish is the gist of the two application and the relation between the two applications. It is indeed that this is an application for extension of time within which the applicant can apply for leave to appeal to the Court of appeal, but as correctly argued by Mr. Sambo, the main application for leave that the extension of time is sought has already been dismissed hence finally determined in a court of law. Therefore the available remedy in such case is an appeal against the said decision and not using the back door to apply for an extension of time, which is what the applicant is trying to misuse the court processes by so doing. In line with the cited authority in Said Salim Bkheresa Vs Ally Ngune, [1997] T.L.R 312 case I sustain the preliminary objection and consequently, I dismiss this application.

Application Dismissed.

Dated at Arusha this 12th day of October, 2015

SGD

S. M. MAGHIMBI

JUDGE

I hereby certify this to be a true copy of the original.




Deputy Registrar
High Court
Arusha

